IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-482

STATE OF MICHIGAN,

Petitioner,

v.

THOMAS W. TUCKER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

KENNETH M. MOGILL, ESQ.
506 Monroe Avenue
Detroit, Michigan 48226
Telephone: (313) 962-7210

Attorney for Respondent

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. The decision in *Johnson v New Jersey* should not be overruled.

II. Where the existence and identity of a witness is learned solely as a direct result of admitted police illegality, and where it is stipulated that no independent source exists for the discovery of the witness' identity, the testimony of that witness must be suppressed.

III. Abandonment or modification of *Miranda* would not benefit law enforcement, would disrupt the administration of justice, would return this Court to the due process test it found incapable of administration, and would seriously weaken the Fifth Amendment privilege.

COUNTER-STATEMENT OF THE CASE

1. *Facts involved in the dispute.* On April 19, 1966, Marion J. Corey, a 43 year old single resident of Pontiac Township, Michigan, failed to report for work at the National Twist Drill Company in nearby Rochester. A co-worker, neighbor and friend, Luther E. White, telephoned Ms. Corey's home to inquire after her and, receiving no answer by phone, went to her home. There he testified that he found Ms. Corey bound and gagged, bloody and apparently brutally beaten. She was partially disrobed and incoherent, and the house was in a blood spattered disarray.

Neither at that time nor later could Ms. Corey recall what happened to her, and at no time has she ever identified Mr. Tucker or anyone else as her assailant.

At the time Mr. White arrived at Ms. Corey's home there was a dog present in the home, although to his recollection Ms. Corey owned no dog. The dog at some point left the house. A dog which he thought to be the same one was later spotted by White, now with an Oakland County Deputy Sheriff, and this animal was followed by the deputy on a zig-zag course to a home about 900 feet away from Ms. Corey's house where it sat down in the front yard.

From a neighbor the deputy learned that Mr. Tucker and his parents lived in this home, that the dog seen running outside belonged to them and that Mr. Tucker drove a red 1959 Ford.

At about noon this information was telephoned to the Oakland County Sheriff's Department.

At about 4:00 p.m. that day Officer Charles Lindberg of the Pontiac Police Department telephoned an unknown person at the Oakland County Sheriff's Department and learned of the crime and that a named suspect was driving a red 1959 Ford. He was not given a description of the suspect.

At about 9:00 p.m. that evening Officer Lindberg saw a red 1959 Ford leaving Pontiac and entering Pontiac Township. There was no traffic violation observed. Nevertheless, the policeman pulled the vehicle over and demanded to see the driver's operator's license. The driver was Mr. Tucker.

Mr. Tucker was arrested and taken to the Oakland County Sheriff's Department where scratches were observed on his face and blood on his clothes. He was questioned and stripped in the course of which additional blood was observed on his underclothing.

Under interrogation Mr. Tucker stated that during the general time period of the alleged offense, he had been with one Robert Henderson, and that thereafter he had been at his home, alone and asleep in bed.

The parties to the proceedings in state court agreed by stipulation of July 14, 1967 (Appendix, p 29), that the identity and whereabouts of Robert Henderson and his connection with this matter were learned about *only* through the above mentioned interrogation of Mr. Tucker and that prior to the interrogation Mr. Tucker was not advised that he had a right to a court-appointed attorney if he was too poor to afford his own counsel. (Throughout the proceedings in state court and in the lower federal courts Mr. Tucker was represented by court appointed counsel, as he is in this action.)

When contacted by police, Henderson stated that Tucker was not with him during the time claimed and that the scratches on his (Tucker's) face were not from a goose that the two had shot since Tucker already had those scratches upon arrival at Henderson's house. Henderson further stated that Tucker had told him that he had had a fight with a "wild one", a "widow woman" who lived nearby.

The existence of the scratches on Tucker's face was corroborated by his work foreman to whom he had allegedly said that they were from the flailing of a goose.

At least six police officers examined Ms. Corey's home for evidence. Fingernail scrapings were taken from Ms. Corey, and an identification technician with the Oakland County Sheriff's Department photographed the scene and collected evidence for scientific testing by the Michigan State Police Crime Laboratory. This evidence was turned over to Detective Kennard Christenson of the Michigan State Police Scientific Detection Laboratory in Lansing. Further, Mr. Tucker's clothing was taken from him at the Oakland County Jail on the evening of his arrest and submitted for scientific examination.

Out of this entire investigation, there was no scientific or eyewitness testimony produced at trial placing Mr. Tucker at Ms. Corey's home. There was no testimony of Mr. Tucker's fingerprints or palm prints having been found anywhere on the premises. Ms. Corey did not identify Mr. Tucker or anyone else as her assailant, and if there were any eyewitnesses they were not located or called to testify at the trial. Moreover, there was no testimony that the blood found on Mr. Tucker's clothes, which was human blood, was Ms. Corey's blood or even the same blood type as Ms. Corey.

2. *State and federal Court proceedings.* Mr. Tucker's first trial ended in a mistrial. At his second trial he was convicted of rape, and on November 9, 1966, he was sentenced to 20-40 years imprisonment. Timely Motion for New Trial was denied January 10, 1968. Petitioner's conviction was affirmed by the Michigan Court of Appeals on October 1, 1969 [*People v Tucker*, 19 Mich App 320, 172 NW2d 712 (1969)], and by the Michigan Supreme Court on August 27, 1971 [*People v Tucker*, 383 Mich 594, 189 NW2d 290 (1971)].

Mr. Tucker's Petition and Brief for Writ of Habeas Corpus, along with Motion to Proceed *in Forma Pauperis* and Affidavit of Indigency, were filed in the United States District Court for the Eastern District of Michigan, Southern Division, on December 15, 1971.

On December 22, 1972, the District Judge's Opinion and Order Granting the Petition for Writ of Habeas Corpus was entered. That decision is reported as *Tucker v Johnson*, 352 F Supp 266 (ED Mich 1972).

On June 21, 1973, the Sixth Circuit affirmed the decision of the District Court without opinion. 480 F2d 927 (6th Cir 1973).

On December 3, 1973, this Court granted certiorari. ___ US ___, ___ S Ct ___, 38 L Ed 2d 467.

This is the Brief of Respondent.

SUMMARY OF ARGUMENT

1. Reconsideration of the rule of *Johnson v New Jersey* at this time would have no appreciable impact whatever on the administration of justice. Prior decisions should not be disturbed except in cases of clear error. The rule of *stare decisis* is particularly important in cases "which affect retroactively the jurisdiction of courts." *Marshall v Baltimore & Ohio R Co., infra. Johnson v New Jersey* should not be reconsidered or overruled.

2. Issue II presents the narrow question of whether, given the existence of an admitted violation of a suspect's constitutional rights, an admitted direct link between an inadmissible statement and the discovery of a witness, and an admitted lack of independent source for the discovery of that witness, there is any precedential, logical or policy basis for creating a distinction between physical and verbal evidence. This Court expressly rejected such a distinction in *Wong Sun*.

Protection of the Fifth Amendment privilege requires excluding all evidence derived from an invalid waiver thereof, including leads and names of witnesses. cf. *Kastigar v United States, infra.*

United States v Calandra, infra, does not detract from this rule, for the question in that case did not bear on whether there exists a basis for distinguishing between types of derivative evidence.

There is no logical basis for distinguishing between physical and verbal evidence. Such a distinction is inconsistent with *Wong Sun.* It ignores the test for administration of the exclusionary rule—the relationship between the primary illegality and the discovery of the evidence. Voluntariness of the witness' testimony is irrelevant since a witness may be compelled to appear in court by subpoena. There is no distinction between physical and verbal evidence in terms of deterrence. The test would produce anomalous results. An officer able to utilize direct, verbal fruits of an unlawful statement would be encouraged to obtain unlawful statements.

There is no distinction between physical and verbal evidence on the ground that physical evidence speaks for itself or that a witness is subject to cross-examination. Just as a search may not be justified on the basis of what it produces, the nature of the evidence here is irrelevant in determining its admissibility. Physical evidence is subject to cross-examination-type scrutiny much the same as verbal evidence by examination of the experts or by independent testing.

Policy also dictates rejection of the proposed distinction. Cases which have attempted to determine the admissibility of verbal evidence on the willingness of the witness to testify have been completely contradictory in their reasoning. There is no logical basis for choosing among any of the "willingness" tests which have been applied. Such a test attempts to draw definite conclusions from ambiguous acts. It is a type of test traditionally disfavored in the law. It would, ultimately, have the admissibility of evidence turn on a witness' feelings towards the courts, police, the victim and the accused.

The proposed distinction would defeat the Fifth Amendment privilege. It should be rejected.

3. Issue III is not whether *Miranda v Arizona* should have been decided. Rather, given the decision in *Miranda*,

has the administration of justice been so severely hampered thereby as to justify departure from *stare decisis*. There has been no showing that *Miranda* has harmed the administration of justice. The available evidence indicates that *Miranda* has not harmed law enforcement or the administration of justice.

Abandonment or modification of *Miranda* would not help stop crime. It would create administrative problems and would effectively sanction the abuses this Court was unable to resolve without *Miranda*. It would create uncertainty in the law and cast the courts in an unfavorable public light.

The rule in *Miranda v Arizona* is necessary because prior decisions of this Court were incapable of protecting the privilege from unknowing and involuntary loss. The due process test of voluntariness was "illusory". It was not followed regularly by lower courts, prosecutors or police.

Miranda has provided an opportunity for effective exercise of the privilege. It has provided an administrable standard. It is also a guide to police. Compliance is a simple matter.

An "inadvertence" test, like good faith, is irrelevant. An "egregiousness" test would, in effect, be the due process test. Abandonment or modification of *Miranda* would seriously weaken the Fifth Amendment privilege. *Miranda* should be adhered to in its entirety.

ARGUMENT

I.

THE DECISION IN *JOHNSON v NEW JERSEY* SHOULD NOT BE OVERRULED.

Johnson v New Jersey, 384 US 719, 86 S Ct 1772, 16 L Ed 2d 882 (1966), applies the standards of *Miranda v Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed2d 694 (1966), to those cases in which custodial statements

taken prior to the decision in *Miranda* were first offered into evidence at trials commencing after the date of decision in *Miranda*. Reconsideration of this rule at this time would have no appreciable impact whatever on the administration of criminal justice in this country, and Petitioner has offered no reasons justifying overruling the decision.[1]

Adherence to prior decisions is a paramount principle in the law, and only in cases of the clearest error will a court set aside its own prior judgment:

> It is almost as important that the law should be settled permanently, as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. *Gilman v Philadelphia*, 3 Wall 713, 724, 18 L Ed 96, 99 (1866).

This principle is particularly important where the case sought to be overruled is a recent one, cf. *Goodtitle ex dem. Pollard v Kibbe*, 9 How 471, 478, 13 L Ed 220, 223 (1850), and of even greater importance where the principle at issue involves retroactivity. As stated by Mr. Justice Grier in *Marshall v Baltimore & Ohio R Co.*, 16 How 314, 325, 14 L Ed 953, 958 (1853):

> There are no cases where adherence to the maxim of "stare decisis" is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts.

Johnson v New Jersey should not be reconsidered or overruled.

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[1] Petitioner should be foreclosed from arguing this question in this Court, as it was not raised in his Petition for Writ of Certiorari. Rules of the Supreme Court, Rule 40(1)(d)(2).

II.

WHERE THE EXISTENCE AND IDENTITY OF A WITNESS IS LEARNED SOLELY AS A DIRECT RESULT OF ADMITTED POLICE ILLEGALITY, AND WHERE IT IS STIPULATED THAT NO INDEPENDENT SOURCE EXISTS FOR THE DISCOVERY OF THE WITNESS' IDENTITY, THE TESTIMONY OF THAT WITNESS MUST BE SUPPRESSED.

A.

After being arrested,[2] Mr. Tucker was taken to the Oakland County Sheriff's Department where he was interrogated by Detective Anderson. Without being warned of his right to court-appointed counsel, Mr. Tucker, an indigent, stated that during the general time period of the alleged offense he had been at his home, alone and asleep in bed. Subsequently officers contacted Henderson, who contradicted Mr. Tucker's story and attributed to him an admission to this offense.

Because of the applicable *Miranda* violation, *Johnson v New Jersey, supra*, Mr. Tucker's statement was suppressed. Henderson's testimony, obtained as a direct result of Mr. Tucker's statement, was nevertheless presented at trial as part of the State's case-in-chief.

By stipulation of July 14, 1967, the parties to the proceedings in state court agreed that the identity and whereabouts of Henderson and his connection with this case were learned about *only* through the above-mentioned interrogation of Mr. Tucker and that prior to the interrogation Mr. Tucker was not advised of his right to court-appointed counsel if too poor to afford his own.[3] At no time has the state claimed that there was an

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[2] Throughout the proceedings below respondent has challenged the legality of his initial arrest. As neither the District Court nor the Court of Appeals has ruled on this question, it is not pursued here.

[3] Throughout the proceedings in the state and federal courts, Mr. Tucker has been represented by court-appointed counsel, as he is in this Court.

independent source for Henderson's discovery or denied that Mr. Tucker's statement led directly to the discovery of Henderson.

B.

This case presents the narrow question of whether, given the existence of an admitted violation of a suspect's constitutional rights, an admitted direct link between an inadmissible statement and the discovery of a witness, and an admitted lack of independent source for the discovery of that witness, there is any precedential, logical or policy basis for creating a distinction between physical and verbal evidence and refusing to suppress the witness' testimony from use in the State's case-in-chief under circumstances where physical evidence would have been excluded.[4] For the reasons set forth below, respondent submits that there is not.

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[4] The evidence found by the Court of Appeals to have been erroneously admitted in this case meets all of the limitations of the exclusionary rule. In summary, these limitations provide that evidence is to be suppressed only where the evidence was directly produced by illegal activity, the illegality was the action of the state, the accused has standing to object, and the connection is not so remote as to dissipate the taint.

Moreover, the state may still introduce the evidence if it is able to demonstrate an independent source for its discovery and, regardless of any error in the discovery of the evidence or lack of independent source, the evidence may still be used before a grand jury, *United States v Calandra*, ___ US ___, ___S Ct ___, ___L Ed2d ___, 14 Cr L 3061 (1974), or to prevent perjury in the case of an accused who testifies falsely. *Harris v. New York*, 401 US 222, 91 S Ct 643, 28 L Ed2d 1 (1971). Finally, except where the illegally obtained evidence is an accused's statement, *Payne v Arkansas*, 356 US 560, 561, 78 S Ct 844, 2 L Ed2d 975, 977 (1958), even where evidence is improperly admitted, an accused is not entitled to a redetermination of innocence or guilt where the introduction of the evidence was harmless beyond a reasonable doubt. *Chapman v California*, 386 US 18, 17 S Ct 824, 17 L Ed2d 705 (1967).

While this Court has never passed on the precise fact question presented herein, *cf. Harrison v United States*, 392 US 219, 223, 88 S Ct 2008, 20 L Ed2d 1047, 1052 (1968) at n 9, this Court has never sanctioned a distinction such as is proposed by the Petitioner and has in fact expressly rejected it in circumstances closely similar to those of the case at bar. *Wong Sun v United States*, 371 US 471, 485-486, 83 S Ct 407, 9 L Ed2d 441, 454 (1963). Moreover, such a distinction is unsound logically and as a matter of jurisprudential policy.

The primary principle involved in this case, the so-called fruit of the poisonous tree doctrine, has been articulated in three prior decisions of this Court, *Wong Sun v United States, supra, Nardone v United States*, 308 US 388, 60 S Ct 266, 84 L Ed 307 (1939), and *Silverthorne Lumber Co. v United States*, 251 US 385, 40 S Ct 182, 64 L Ed 319 (1920). Additionally, the scope of exclusion necessary was discussed in *Alderman v United States*, 394 US 165, 89 S Ct 961, 22 L Ed2d 176 (1969), and the protection needed to safeguard the Fifth Amendment privilege was recently considered in *Kastigar v United States*, 406 US 441, 92 S Ct 1653, 32 L Ed2d 212 (1972). These and related cases hold that the government may gain no evidentiary advantage from its illegal activities, *Silverthorne, supra*, 251 US at 391-392, 64 L Ed at 321, and that the courts must prevent full indirect use, *Nardone, supra*, 308 US at 340, 84 L Ed at 311; *Kastigar, supra*, 406 US at 453, 32 L Ed2d at 222, of all evidence illegally obtained, anything of evidentiary value, *Davis v Mississippi*, 394 US 721, 724, 81 S Ct 1394, 22 L Ed2d 676, 679 (1969), regardless of the physical or verbal nature of that evidence. See also *Miranda, supra*, 384 US at 479, 16 L Ed2d at 726.[5]

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[5] *United States v Calandra, supra*, does not weaken the application of this rule in the circumstances of this case. The issue in *Calandra* was whether to permit the use of illegally seized evidence and its fruits before a grand jury and not, as in the case at

Mr. Justice Holmes first articulated the poison fruit rule for the Court in *Silverthorne.*[6] In that case the government illegally seized corporate books and documents of the petitioner. Obliged to return these items, the government did so, but only after taking photographs which it used to subpoena the petitioner *duces tecum* to produce the originals before the grand jury. The petitioner refused to comply and was cited for contempt. Reversing the contempt, Justice Holmes addressed himself first to the position of the government in stating the holding of the Court:

> The proposition could not be presented more nakedly . . . that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act . . . In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a

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bar, whether there exists a basis for distinguishing between various types of derivative evidence in circumstances where it has already been determined that illegally seized evidence and its fruits must be suppressed. Because of the historical role and function of the grand jury, the difficulty of administering such a rule, the possible impact of such a rule on the efficacy of the grand jury's functioning and a perceived lack of deterrent effect, the Court decided against suppression in *Calandra.* None of those considerations are present in this case.

[6] While *Silverthorne* was a Fourth Amendment case, the same considerations govern the scope of the exclusionary rule regardless of the source of the violation, for once the primary taint is established, the question becomes one of the relationship between the violation and the evidence, *Wong Sun, supra,* 371 US at 488, 9 L Ed2d at 455, measured in light of the purposes of the provision which has been violated. See generally, Ruffin, "Out on a Limb of the Poisonous Tree: The Tainted Witness", 15 UCLA L Rev 36 (1967); Note, "The Supreme Court, 1967 Term," 82 Harv L Rev 63, 221-222 (1968).

certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. *Id.*, 251 US at 391-392, 64 L Ed at 321.

In *Nardone*, the Court reversed a Court of Appeals ruling that the petitioner may not challenge prosecution evidence as being derived from evidence which the Court in the first *Nardone* decision, 302 US 379, 58 S Ct 275, 82 L Ed 314 (1937), had ruled unlawfully obtained.[7] In his opinion for the Court, Mr. Justice Frankfurter reiterated the "independent source" limitation previously stated by Justice Holmes in *Silverthorne*, 251 US at 392, 64 L Ed at 321, and spoke to the practical application of the rule. He emphasized that "full indirect use" of illegally seized evidence must be prohibited for the rule to have meaning, while noting that as the connection grows more tenuous the taint becomes "dissipated":

> [The first *Nardone*] decision was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it had outlawed because "inconsistent with ethical standards and destructive of personal liberty" . . . (cite omitted). *To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed "inconsistent with ethical standards and destructive to personal liberty."* 308 US at 340, 84 L Ed at 311 (emphasis added).
>
> . . .
>
> Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proofs. As a

[7] In that case the Court applied the exclusionary rule of Section 605 of the Communications Act of 1934, 47 USC §605, to violations of that section [wiretapping] by federal agents.

matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. 308 US at 341, 84 L Ed at 312.

In *Wong Sun*, the Court was faced with an application of this rule to circumstances very similar to the case at bar. One James Wah Toy had in that case made several statements to federal narcotics agents, which statements were held to be inadmissible against him. *Id.*, 371 US at 484-486, 9 L Ed2d at 453-454. Like your respondent Mr. Tucker, Mr. Toy had intended his statements to be exculpatory, but like Mr. Tucker's declaration, his led the agents to the source of his conviction, in that case Mr. Johnnie Yee. Learning of Yee's identity, agents immediately went to his home where they found the narcotics which were introduced at trial against Toy.

Reversing Toy's conviction for violation of federal narcotics laws, the Court, without dissent as to this point, *cf.* 371 US at 497 *ff.* 9 L Ed2d at 461 *ff.* expressly rejected any distinction among types of derivative evidence and held the narcotics inadmissible as clearly "come at by the exploitation" of the primary illegality. 371 US at 488, 9 L Ed2d at 455.

In his opinion for the Court, Mr. Justice Brennan stated:

> . . . verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion . . . (cite omitted). *Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence . . . [for] the danger of relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction.* 371 US at 484-486, 9 L Ed2d at 454 (emphasis added).

The suggestion that the statements should be admissible as the product of an "intervening independent act of free will" was rejected. *Id.*

The Court also expressly rejected any distinction between ostensibly exculpatory and incriminating statements.[8]

Mr. Justice White, speaking for the Court in *Alderman*, noted that petitioners with standing "would be entitled to the suppression of government *evidence originating in* [illegal] electronic surveillance," 394 US at 176, 22 L Ed 2d at 188 (emphasis added), and rejected Mr. Justice Harlan's proposed distinction between an overheard third party conversation and a document containing the third party's own written words as incapable of effectuating the rights involved. 394 US at 179, 22 L Ed 2d at 190, n 11. Additionally, the scope of materials made available to the defense had to be sufficiently broad to permit demonstration of a taint growing out of

> [a]n apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, [or] *the identity of a caller or the individual*

[8] See 371 US at 471, 9 L Ed2d at 455:

"The Government also contends that Toy's declarations should be admissible because they were ostensibly exculpatory rather than incriminating. First, the statements soon turned out to be incriminating, for they led directly to the evidence which implicated Toy. Second, when circumstances are shown such as those which induced these declarations, it is immaterial whether the declarations be termed "exculpatory". Thus we find no substantial reason to omit Toy's declarations from the protection of the exclusionary rule."

See also *Miranda v Arizona*, 384 US 436, 476-477, 86 S Ct 1602, 16 L Ed 2d 694, 725 (1966).

See also Note, "Developments in the Law - Confessions," 79 Harv L Rev 935, 1030-1036 (1966), where analysis of the issue concludes: ". . .no distinctions among categories of defendants' out-of-court statements can constitutionally be made, and the test for admissibility must be the same for confessions, admissions, and exculpatory statements."

on the other end of a telephone . . . 394 US at 182, 22 L Ed 2d at 192 (emphasis added).

Kastigar, supra, is also pertinent, differing from the case at bar only in that there the Court was looking forward in protecting the privilege while here the view is retrospective. In *Kastigar,* the Court was concerned with the scope of immunity necessary to protect the Fifth Amendment privilege. Petitioners argued that the federal use-immunity statute under consideration, 18 USC § 6002, would not adequately protect their Fifth Amendment rights because, in their view, it would not

> protect a witness from various possible incriminating uses of the compelled testimony: for example, . . . leads, names of witnesses . . . 406 US at 459, 32 L Ed2d at 225.

To this, the Court responded that the statute would protect against such uses, that it

> . . . provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead", . . . 406 US at 460, 32 L Ed2d at 226.

Moreover, the grant of immunity had to be this broad in order to protect the privilege. Speaking through Mr. Justice Powell, this Court ruled that in order to guarantee the constitutional privilege, a grant of immunity had to bar

> the use of compelled testimony, as well as evidence derived directly and indirectly therefrom . . . It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect . . . 406 US at 453, 32 L Ed2d at 222 (emphasis in original).

The statute, like the Fifth Amendment, allows the use of evidence only if obtained from an independent source or in no way produced by the immunity-compelled testimony. *Id.*

The interests at stake in *Kastigar* are exactly the same as those in the case at bar—the protection of the Fifth

Amendment privilege. The analogy is, in fact, expressly recognized in *Kastigar*, 406 US at 461, 32 L Ed2d at 226-227. Just as witnesses whose names are learned as the result of immunity-compelled testimony may not be used against an accused person, so too, the testimony of a witness whose identity is learned solely as the result of a statement given in violation of the Fifth Amendment may not be used in evidence.[9]

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[9] *Davis v Mississippi*, 394 US 721, 723-724, 89 S Ct 1394, 22 L Ed2d 676, 679 (1969), where the court rejected an attempt to distinguish between fingerprints and other illegally seized evidence on the grounds of the trustworthiness of the former, is also relevant:

"At the outset, we find no merit in the suggestion in the Mississippi Supreme Court's opinion that fingerprint evidence, because of its trustworthiness, is not subject to the proscriptions of the Fourth and Fourteenth Amendments. Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine those purposes. Thus, in *Mapp v Ohio*, . . . (cite omitted), we held that "*all* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority inadmissible in a state court." (Italics supplied). Fingerprint evidence is no exception to this comprehensive rule. We agree with and adopt the conclusion of the Court of Appeals for the District of Columbia in *Bynum v United States*, 104 US App DC 368, 370, 262 F2d 465, 467 (1958):

'True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed by the same token all should be proscribed.'

A large number of state and federal courts have also excluded the testimony of witnesses identified as a result of constitutional violations or have otherwise refused to distinguish between physical and verbal evidence. *People v Quicke*, 71 Cal 2d 502, 78 Cal Rptr 683, 455 P2d 787 (1969); *People v Mickelson*, 59 Cal 2d 488, 30 Cal Rptr 18, 380 P2d 658 (1963); *People v Schaumloffel*, 53 Cal 2d 96, 346 P2d 393 (1959); *People v Mills*, 148 Cal App 2d 392, 306 P2d 1005 (1957); *People v Albea*, 2 Ill 2d 317, 118 NE2d 277 (1954); *People v Schmall*, 383 Ill 280, 48 NE2d 933 (1943); *People v Martin*, 382 Ill 192, 46 NE2d 997 (1942); *People v Dannic*, 30 App Div 2d 679, 292 NYS 2d 257 (1969); *People v Peacock*, 29 App Div 2d 762, 287 NYS2d 166 (1968); *State v Rogers*, 27 Ohio App 2d 105, 198 NE2d 796 (1963); *Commonwealth v Cephas*, 447 Pa 500, 291 A2d 106 (1972); *Williams v United States*, 382 F2d 48 (5th Cir 1967); *United States v Tane*, 329 F2d 848 (2nd Cir 1964); *United States v Alston*, 311 F Supp 296 (DDC 1970); *Abbott v United States*, 138 A2d 485 (DC Ct Muni App 1958); *Somer v United States*, 138 F2d 790 (2d Cir 1943).

See also, generally, *People v Drumright*, Colo Sup Ct, 475 P2d 329 (1970); *Killough v United States*, 315 F2d 241 (DC Cir 1962); *United States v Paroutian*, 299 F2d 486 (2nd Cir 1962); *Payne v United States*, 294 F2d 723 (DC Cir 1961); *Bynum v United States*, 262 F2d 465 (DC Cir 1958); *United States v Klapholz*, 230 F2d 494 (2nd Cir 1956); *United States v Schipani*, 289 F Supp 43 (EDNY 1968); *Goodman v United States*, 285 F Supp 245 (CD Cal 1968); *United States v Birrell*, 276 F Supp 798 (SDNY 1968).

See also *Albertson v Subversive Activities Control Board*, 382 US 70, 78, 86 S Ct 194, 15 L Ed2d 165, 171 (1965); *Murphy v Waterfront Commission*, 378 US 52, 79, 84 S Ct 1594, 12 L Ed2d 678, 695 (1964); *Malloy v Hogan*, 378 US 1, 11, 84 S Ct 1489, 12 LEd2d 653, 661 (1964).

Any distinction between physical and verbal evidence has also been severely criticized in the legal literature. Pitler, " 'The Fruit of the Poisonous Tree' Revisited and Shepardized," 56 Cal L Rev 579 (1968); Ruffin "Out on a Limb of the Poisonous Tree: The Tainted Witness," 15 UCLA L Rev 32 (1967); Comment, "Fruit of the Poisonous Tree — A Plea for Relevant Criteria," 115 U Pa L Rev 1136 (1967). See also Hirtle, "Inadmissible Confessions and Their Fruits: A Comment on *Harrison v United States*", 60 J Cr L C & PS 58, 61-62 (1969); Broeder, *"Wong Sun v United States*: A Study in Faith and Hope", 42 Nebr L Rev 483, 548-550 (1963); Note, 30 NYU L Rev 1121, 1123 (1955); Annotation, "Fruit of the Poisonous Tree", 43 ALR3d 385.

The proposed distinction between the testimony of a live witness and tangible evidence grows out of *Smith and Bowden v United States*, 324 F2d 879 (DC Cir 1963). In that case, inadmissible statements of appellants had led police to Holman, an accomplice and witness, and his testimony was admitted against them over objection at their trial. On appeal, the circuit court panel ruled that since the witness had initially been reluctant to testify, *cf. McLindon v United States*, 329 F2d 238, 241 n 2 (DC Cir 1964), the subsequent time for reflection and the decision to testify had dissipated the taint. 324 F2d at 881. An additional consideration given in support of the ruling was the fact that the interaction of the witness' "attributes of will, perception, memory and volition," *Id.*, also determined what testimony he would give — *i.e.*, there was no guarantee that his testimony would be favorable to the prosecution.

This test was applied in several other District of Columbia Circuit cases. *McLindon v United States, supra; Edwards v United States*, 330 F2d 849 (DC Cir 1964); *Smith and Anderson v United States*, 344 F2d 545 (DC Cir 1965); *Brown v United States*, 375 F2d 310 (DC Cir

1966), with the results turning on the various judges' assessments of the effects of the factors of "will, perception, memory and volition", outlined in *Smith and Bowden*. It was also applied by the Michigan Court of Appeals in the original proceeding in this case. *People v Tucker*, 19 Mich App 320, 172 NW2d 712 (1969).[10] See also *United States v Tane, supra*.

Upon analysis, this test is not logically defensible. It is deficient first, in that it ignores the clear language in *Wong Sun* rejecting any distinction between physical and verbal evidence, 371 US at 485-486, 9 L Ed2d at 454. While the opinion in *Wong Sun* was in reference to the appellant's and not a witness' statement, nothing in the opinion would admit such a distinction and neither any of the factors listed in *Smith and Bowden* nor any of the policies underlying the exclusionary rule distinguish between such persons.

Moreover, *Wong Sun* excluded from use against Toy narcotics found in Yee's possession as a result of Toy's inadmissible statement. The only distinction between the case at bar and *Wong Sun* is that in this case it is testimony which was suppressed and not narcotics. However, the narcotics seized in *Wong Sun* could not have been used against Toy without Yee's statement connecting them to Toy. *Cf.* 371 US at 475, 9 L Ed2d at 447. This Court's decision rejecting the narcotics as against Toy necessarily also rejected Yee's testimonial evidence from use against Toy as well.

The proposed distinction is also testimony in that it ignores the source of the profferred witness' testimony and the relationship between that source and the primary illegality. Additionally, except in the case of a witness

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[10] As to the continuing vitality of *Tucker* in Michigan, see *People v Robinson*, 48 Mich App 253, 210 NW2d 372 (1973), 48 Mich App at 260, n 1, lv den 393 Mich 793, citing the District Court decision in this case with approval. See also *People v Weaver* 35 Mich App 504, 192 NW2d 572 (1971), 35 Mich App at 515, n 5.

who is an accomplice, the voluntariness of a witness' testimony is irrelevant,[11] as the compulsory process powers of the court can readily command his or her appearance.

Nor is there any distinction in terms of deterrence[12] between physical and verbal evidence. An officer attempting to obtain evidence as a result of a statement is interested in finding whatever evidence is available therefrom, physical or verbal, and would be actively encouraged to obtain inadmissible statements if a verbal direct fruit of such statements were nevertheless admissible at a suspect's trial. *Alston, supra,* 311 F Supp at 298-299; Pitler, *supra,* 56 Cal L Rev at 620.

Finally, physical and verbal evidence cannot be distinguished on the ground that physical evidence "speaks for itself", Brief of Petitioner, p 6, that there is no guarantee that the witness' testimony will be favorable to

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[11] In a situation such as *Smith and Bowden,* where the witness is an accomplice, voluntariness is still irrelevant since it is unrelated to the source of the witness' discovery, but even if voluntariness were a factor, the focus would be on the use of improper means in obtaining a waiver of the privilege, *Harrison v United States, supra; United States v Tane, supra,* and not on the mere fact that the witness, for whatever reason, ultimately decided to testify. See also: Ruffin, *supra,* 15 UCLA L Rev at 42 and cases cited therein; Note, "The Supreme Court, 1967 Term", 82 Harv L Rev, *supra,* at 220-224; Note, "Developments in the Law-Confessions", 79 Harv L Rev, *supra,* at 1026-1028; *Lefkowitz v Turley,* __ US __, 94 S Ct __, 38 L Ed2d 274 (1973); *Garrity v New Jersey,* 385 US 493, 87 S Ct 616, 17 L Ed2d 562 (1967); *Fahy v Connecticut,* 375 US 85, 84 S Ct 229, 11 L Ed2d 171 (1963).

[12] Petitioner argues that because the officers complied with the law as it existed at the time of the interrogation in this case, there can be no deterrent effect from suppression. Brief of Petitioner, p 10. However, because this case is within the class of cases to which *Johnson v New Jersey, supra,* applies *Miranda* retroactively, the question in this case must be considered in light of the deterrent effect it would have had if the interrogation had occurred after *Miranda* or else without regard to the deterrent effect altogether.

the prosecution, or that the witness' testimony is subject to "all the rigors of cross-examination". Brief of Petitioner, pp 12-13. These considerations do not go to the relationship between the discovery of the evidence and the police illegality and are for that reason alone invalid.

Moreover, just as a search may not be justified on the basis of what it produces, *Sibron v New York*, 392 US 40, 62-63, 88 S Ct 1889, 20 L Ed2d 917, 934-935 (1968); *Johnson v United States*, 333 US 10, 16-17, 68 S Ct 367, 92 L Ed 435, 441-442 (1948), the admissibility of evidence has never turned on whose side it favors or on whether it was, in fact heroin as opposed to, for example, lactose, or was, in fact, marijuana as opposed to, for example, oregano. Similarly, physical evidence is subject to cross-examination-type scrutiny much the same as verbal evidence by examination of the chemist, toxicologist, fingerprint or ballistics expert who has analyzed the evidence and by submission for independent examination by a defense expert.

Policy considerations also dictate rejection of this test. Neither *Smith and Bowden* nor any of the cases attempting to apply the *Smith and Bowden* test have ever articulated any standards for applying the test, and it appears that none are available. Petitioner suggests none. In *Smith and Bowden* and *Edwards, supra*, for example, the later-overcome expressions of reluctance by the witnesses were viewed as attenuating the taint and thus permitting admission of the testimony.

In *Tucker*, the Michigan Court of Appeals reasoned just the opposite and found that since Henderson's testimony appeared to be voluntary, there was no exploitation and the testimony was therefore admissible.[13] In *Smith and Anderson, supra*, the witness'

[13] There is no basis whatever in the record of this case for the inference by the Michigan Court of Appeals that Henderson would have possibly appeared voluntarily. 19 Mich App at 330, 172

apparent voluntariness was viewed as not breaking the chain, and the testimony was therefore suppressed. In *Tane, supra,* pressure placed on the witness after his initial reluctance was viewed as exploitation of the taint, and the testimony was therefore inadmissible.

Any attempt to choose among these cases, to determine whether initial reluctance "attenuates" or "exploits" the taint or whether initial willingness to testify is insufficient to break the chain or does in fact break the chain, is purely arbitrary, for there is no relationship between any of these factors and the objectives of the exclusionary rule.

Additionally, tests which attempt to draw definite conclusions from ambiguous acts have traditionally been disfavored in the law. As stated by Sir Frederick Pollock:

> It concerns us as lawyers to know not so much what philosophers will call an act as of what kinds of acts, and to what purpose, the law takes notice. Generally speaking, the law has regard only to such acts as are voluntary and manifest. This is a necessary consequence of the nature of legal justice. The judgment of law must not only be but appear just, and can deal only with that which is capable of proof. The secret counsels and resolves of a man's mind are voluntary, but not manifest. . *As to acts*

NW2d at 718. Such an inference, in the nature of an "inevitable discovery" argument, is in fact foreclosed in this case by the States' Stipulation (Appendix, p 29) that the *only* basis for the discovery of Henderson's existence and identity was Mr. Tucker's inadmissible statement. Cf. *Davis v Mississippi, supra,* 394 US at 723-724, 22 L Ed2d at 679; *Bynum v United States, supra; United States v Paroutian, supra,* 299 F2d at 489; Pitler, *supra,* 56 Cal L Rev at 627-630.

However, in the event that this Court should adopt the *Smith and Bowden* test, Respondent will be entitled to a remand for an evidentiary hearing on the voluntariness of Henderson's testimony. This request was seasonably made in the District Court and has been preserved on appeal.

> *of the mind which are not directly manifested in outward performances, the law will not generally take account of them, both because they cannot be certainly known, and because no certain result can be assigned to them.* F. Pollock, *Jurisprudence and Legal Essays*, 79-80 (1961) (emphasis added).

Somer, supra, illustrates well the problems that the proposed distinction would entail. In that case, an illegal search of defendant's apartment led agents to defendant's wife, who was found on the premises. Upon questioning at the apartment, Mrs. Somer told the agents when her husband would return, and on the basis of this information they went out to the street and stopped defendant as he pulled up. Observing a five pound bag marked "granulated sugar" behind the front seat and learning from defendant of a quantity of alcohol in the trunk, the officers arrested defendant and seized the sugar and alcohol.

The district court ordered "all evidence and information obtained. . .as a result of a search and seizure in the apartment" suppressed, 138 F2d at 791, but admitted the evidence found in the car. The Second Circuit, per L. Hand, J., reversed on the basis of *Silverthorne*, holding:

> As the record now stands, it was the information unlawfully obtained which determined their course. Since therefore the seizure must be set down to information which the officers were forbidden to use, it was itself unlawful under settled law. *Id.*

If the distinction proposed by Petitioner were adopted broadly, the evidence obtained through Mrs. Somer's statements would potentially be admissible if her testimony were found to be voluntary. This would effectively overrule *Wong Sun*, however, and permit the police to profit at trial from their uncontested, *Id.*, illegality.

If the distinction were applied only in the case of evidence used at trial, however, cf. *Brown, supra*, 375

F2d at 319, and not with regard to statements leading to evidence introduced at trial, admissibility would turn on where in the chain the "live" evidence occurred rather than on the strength of the chain. If Mrs. Somer's statements had led to a witness used against Somer, the two statements would be treated differently despite being equally related to a tainted source and both having been sought for the same purpose.

Similarly, if Mrs. Somer's statements, or physical evidence illegally obtained, had led to a witness against Somer plus the physical evidence, the former would be potentially admissible while the latter was suppressed despite identical sources for the two. The results would be anomalous.

The commentators have expressed a similar opinion. Judge Ruffin concluded that "the possible existence or working of" these "mentalistic entities" "are irrelevant to the purpose of the decision," 15 UCLA L Rev at 63, and, further, that

> . . .the will and volition concepts as employed in the *Smith and Bowden* line of cases are spurious and unnecessary, and can be manipulated, whatever the facts or merits of the case, to justify any decision deemed a priori desirable.
> 15 UCLA L Rev at 64.

At the conclusion of his analysis, Pitler states simply:

> No distinction remains, if ever one existed, between tangible evidence and "live" witnesses when determining what is, or is not, the fruit of the poisonous tree. Any other result is inconsistent with the deterrence rationale of the "fruit of the poisonous tree" doctrine. 56 Cal L Rev at 624.

> . . . it is clear that if the police were permitted to utilize illegally obtained confessions for links and leads rather than being required to gather evidence independently, then the *Miranda* warnings would be of no value in protecting the privilege against

> self-incrimination. The requirement of a warning would be meaningless, for the police would be permitted to accomplish indirectly what they could not accomplish directly, and there would exist no incentive to warn. *Id.*, at 620.

Similarly, in the comment at 115 U Pa L Rev, *supra*, the author concludes:

> . . . [this distinction] is based not upon the police conduct, nor upon the nature of the crime involved, but upon the vagaries and peculiarities of the individual witnesses and the promptness with which they respond to a governmental request for assistance. How such a line between "tainted" and "untainted" evidence can be considered anything but "coin flipping" is difficult to perceive.
> 115 U Pa L Rev at 1147.

Even in a case note written prior to *Wong Sun* and *Mapp v Ohio*, 367 US 483, 81 S Ct 1684, 6 L Ed2d 1081 (1961), the author is of the opinion that where physical evidence is suppressed, there is no logical distinction between physical and verbal evidence. Note, 30 NYU L Rev, *supra*, at 1123.

Ultimately, the *Smith and Bowden* test would have the admissibility of evidence turn on a witness' feelings toward an accused, the courts, the police and the victim. Rather than being based on legal principles, the admissibility of testimony would depend on motives of friendship, fear and revenge. By admitting direct, foreseeable products of police illegality, such a rule would actively encourage that activity.

In the case at bar, it would perhaps be easier to see the need for suppression of Henderson's testimony if Mr. Tucker's statement had been the product of physical coercion. Mr. Tucker did give an admittedly inadmissible statement, however, and the means by which he was induced improperly to waive his Fifth Amendment

privilege are irrelevant. *Wong Sun, supra; Miranda, supra; Harrison, supra;* see also *Irvine v California,* 347 US 128, 133-134, 138, 74 S Ct 381, 98 L Ed 561, 569-570, 572 (1954), plurality opinion of Mr. Justice Jackson and concurring opinion of Mr. Justice Clark. As a result solely of that statement the government obtained the testimony of a key prosecution witness. The statement itself has been suppressed, but the government was able to use the testimony of the witness against Mr. Tucker at trial because the testimony is not tangible evidence. This Court has never recognized this distinction and has, in fact, recently rejected it.

The Fifth Amendment guarantees that "no person. . .shall be compelled in any criminal case to be a witness against himself" or be "the conduit by which the police acquire evidence." *Bivens v Six Unknown Federal Narcotics Agents,* 403 US 388, 414, 91 S Ct 1999, 29 L Ed2d 619, 637 (1971), opinion of Burger, Ch. J., dissenting. Unless the decision below is affirmed, this principle will be defeated.

For all the reasons stated above, the decision of the Court of Appeals should be affirmed.

III.

ABANDONMENT OR MODIFICATION OF MIRANDA WOULD NOT BENEFIT LAW ENFORCEMENT, WOULD DISRUPT THE ADMINISTRATION OF JUSTICE, WOULD RETURN THIS COURT TO THE DUE PROCESS TEST IT FOUND INCAPABLE OF ADMINISTRATION, AND WOULD SERIOUSLY WEAKEN THE FIFTH AMENDMENT PRIVILEGE.

A.

The question before this Court at this time is not whether the warnings set out in *Miranda v Arizona* should be required but, rather, given the existence of this requirement, has it been shown to be so clearly erroneous

and such an impairment to the administration of justice as to justify departure from the principles of *stare decisis. Gilman v Philadelphia, supra; Marshall v Baltimore & Ohio R Co., supra; Goodtitle ex dem. Pollard v Kibbe, supra.*

Prior decisions of this Court should only be departed from where they are shown to be clearly erroneous. There has been no such showing by Petitioner.

Uncertainty and vacillation in the law should be avoided, for they interfere with the administration of justice and tend to cast the courts in an unfavorable public light.

Departure from *Miranda* as it presently exists would produce more damage than benefit to the criminal justice system. It would disrupt the administration of the law and cause confusion in the lower courts. It would create administrative problems requiring extensive and protracted litigation to resolve without providing commensurate benefit to law enforcement.

Miranda does not prevent police from interrogating persons who knowingly and voluntarily waive their right to silence. *Miranda* does not prevent questioning of witnesses. The police must now merely inform a suspect of the rights available at interrogation and the consequences of waiver of those rights, and if those rights are asserted the exercise must be respected.

Miranda has provided an objective standard for determining the validity of purported waivers of the privilege, freeing this Court and the lower courts from the "elusive, measureless standard" of voluntariness previously existing. *Reck v Pate,* 367 US 433, 455, 81 S Ct 1541, 6 L Ed2d 948, 962 (1961), Clark, J., dissenting. While judgments as to waiver must still be made, there is now a clear standard against which to measure. This standard is also a guide to the police, for it reduces the guesswork involved in any attempt to determine whether

interrogation may lawfully proceed in a given instance.

The studies which have been conducted to date indicate that no harm has come to law enforcement or the judicial system from the operation of *Miranda*. *Cf.* Younger, "Interrogation of Criminal Defendants - Some Views on *Miranda v Arizona*", 35 Fordham L Rev 255 (1966); Note, "Interrogations in New Haven: The Impact of *Miranda*", 76 Yale L J 1519 (1967); Griffiths & Ayres, "A Postscript to the *Miranda* Project: Interrogation of Draft Protesters", 77 Yale L J 300 (1967); Seeburger & Wettick, "*Miranda* in Pittsburgh - A Statistical Study", 29 U Pitt L Rev 1 (1967); Medalie, Zeitz & Alexander, "Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement *Miranda*", 66 Mich L Rev 1347 (1968); McCullough, "Balancing the Rights of the Accused and the Public in Constitutional Probity", 54 ABAJ 273 (1968); Driver, "Confessions and the Social Psychology of Coercion", 82 Harv L Rev 42 (1968); Zeitz, Medalie & Alexander, "Anomie, Powerlessness & Police Interrogation", 60 J Cr L C & PS 314 (1969); Leiken, "Police Interrogation in Colorado", 47 Denv L J 1 (1970).

B.

The practice of incommunicado police interrogation of persons suspected of crime for the purpose of inducing "voluntary" waivers of the Fifth Amendment privilege and assisting in the conviction of the accused by his or her own statements is of relatively recent historical origin. While several factors are involved in the development of the practice, including the establishment in the nineteenth century of full-time police departments and the growth in this country of the doctrine of separation of powers, *cf.* Barrett, "Police Practices & The Law - From Arrest to Release or Charge", 50 Cal L Rev 11,

17-18 (1962), incommunicado interrogation by police is in no small part the step-child of the practice of judicial interrogation of an accused at trial, abolished in the seventeenth century, *cf.* Levy, L.W., *Origins of the Fifth Amendment* (1968), and interrogation of an accused by the magistrate at examination, abolished in the nineteenth century, Barrett, *supra,* at 17-18; Note, "An Historical Argument for the Right to Counsel During Police Interrogation", 73 Yale L J 1000, 1034-1041 (1964); Maitland, *Justice & Police* 100 (1885).

The system which has developed operates in secret, without courtroom safeguards or a record being made, and with judicial review highly limited. Even when conducted without overt pressure, the balance in interrogation is weighted heavily in favor of the interrogator. Driver, *supra;* Note, "Developments in the Law - Confessions", *supra,* at 1004.[14]

Regardless of whether police interrogation is useful in solving crime,[15] it is a process which "easily glide(s) into the evils of 'the third degree' ", *Mallory v United States,*

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[14] *Bronston v United States,* 409 US 352, 93 S Ct 595, 34 L Ed2d 568 (1973), is relevant to the psychological pressures on a suspect during interrogation. Speaking through the Chief Justice, this Court in that case noted that, "[u]nder the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers which are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it." 409 US at 358, 34 L Ed2d at 574. Bronston was a wealthy, well-counseled motion picture executive. The reasoning therein applies *a fortiori* to an uncounseled, poorly educated suspect being interrogated at a precinct station.

[15] Petitioner's *Amici* Americans for Effective Law Enforcement and the International Association of Chiefs of Police, Inc., argue at p 13 of their Brief that interrogation is necessary in some cases as "the only means of proving the guilt of the perpetrator of a crime." *Id.* However, the examples therein ignore the fact that in

354 US 449, 453, 77 S Ct 1356, 1 L Ed2d 1479, 1482 (1957), and implicity threatens the Fifth Amendment privilege. As this Court long ago noted in *Brown v Walker*, 161 US 591, 596-597, 40 L Ed 818, 821 (1896):

> The ease with which the questions put to [a suspect] . . . may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions . . .

is so entwined in the process of interrogation that the privilege is quickly subject to loss or erosion unless carefully guarded.

If the threat to the privilege were merely implicit, it is unlikely that *McNabb v United States*, 318 US 332, 63 S Ct 608, 87 L Ed 819 (1943), *Mallory v United States*, *supra*, or *Miranda* would ever have been necessary. This Court's confession decisions since *Brown v Mississippi*, 297 US 278, 56 S Ct 461, 80 L Ed 682 (1936), unfortunately demonstrate, however, that the threat has been very real indeed. "Voluntary" confessions have been induced by hanging, *Brown*, *supra*, whipping, *Brown*, starvation, *Payne v Arkansas*, 356 US 560, 78 S Ct 844, 2 L Ed2d 975 (1958); *Reck v Pate*, *supra*, and prolonged detention, *Davis v North Carolina*, 384 US 737, 86 S Ct 1761, 16 L Ed2d 895 (1966); *Mallory v United States*,

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the situations cited there can be no lawful custodial interrogation for the reason that there is insufficient evidence to justify taking anyone into custody. As Mr. Justice Frankfurter stated for this Court in *Mallory*, *infra*:

> Presumably, whomever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause". 354 US at 456, 1 L Ed2d at 1484.

supra. The statements produced by these "unfettered exercise(s) of free will", *Malloy v Hogan, supra*, 378 US at 8, 12 L Ed2d at 659, have been offered into evidence by prosecutors, accepted into evidence by trial judges and their use has been sanctioned by appellate courts.

Prior to *Miranda*, this Court found itself in the position of attempting to preserve the integrity of the trial process in situations where a trial was, in effect, an appeal from the interrogation. *Cf. Escobedo v Illinois*, 378 US 478, 486-488, 84 S Ct 1758, 12 L Ed2d 977, 983-984 (1964); Comment, "The Coerced Confession Cases in Search of a Rationale", 31 U Chi L Rev 313, 321 (1964). Moreover, the standard on "appeal" was "illusory", Dession, "The New Federal Rules of Criminal Procedure", 55 Yale L J 694, 708 (1946); cf. Clark, J., dissenting in *Reck v Pate, supra*, and was not followed by the lower courts with any degree of regularity. Note, "Developments in the Law - Confessions", *supra*, at 984; see also *Miranda, supra*, 384 US at 509, 16 L Ed2d at 743, Harlan, J., dissenting.

This Court itself reviewed only about one confession case a year between *Brown* and *Miranda*, and none of these decisions were able to promulgate a standard which the Court could articulate or the lower courts, prosecutors or police could apply. The availability of the privilege still turned more on a suspect's power of resistence, and to a lesser extent his or her social and educational level, *cf.* Zeitz, Medalie & Alexander, 60 J Cr L C & PS, *supra*, than on any other factors.

Moreover, the Court had already come to recognize that reliance on confessions was inherently dangerous to the maintenance of the accusatorial system, for as Dean Wigmore stated:

> ". . . The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. . .If there is a right to an answer, there soon seems to be a right to the expected answer. . ." 8

> Wigmore, Evidence 309 (3d ed 1940), cited in *Escobedo, supra,* 378 US at 489, 12 L Ed2d at 985.

See also *Mallory, supra,* 354 US at 452-453, 1 L Ed2d at 1482.

Miranda recognized that because of the importance of interrogation to the fairness of a trial, *Schneckloth v Bustamonte,* ____US ___, 93 S Ct ___, 36 L Ed2d 854, 870 (1973), the state has a primary obligation fully to inform a suspect of the rights available at custodial interrogation. Warnings must be given in order to insure the existence of the privilege in fact as well as form, *cf. Powell v Alabama,* 287 US 45, 57, 53 S Ct 55, 77 L Ed 158, 164 (1932), and to insure that any waiver is made knowingly. *Johnson v Zerbst,* 304 US 458, 58 S Ct 1019, 82 L Ed 1461 (1938).

The exhaustive analysis of the history of confessions law prepared on the eve of *Miranda,* Note, "Developments in the Law—Confessions", *supra,* similarly concludes that warnings must be given in order to hope to protect the privilege. 79 Harv L Rev at 981-982.

Adherence to the requirement of complete warnings is sound constitutional policy as well. Fear that citizens will exercise their constitutional rights if known to them, or fear that exercise of rights will harm the administration of law, which fear is "envenomed" during a time of perceived crime increase "by our unexpiated heritage of racism and enflamed by our national fascination with violence", McGowan, "Rule-Making and The Police", 70 Mich L Rev 659, 660 (1972), has no place in a democracy:

> . . .no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he

> will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. *Escobedo, supra*, 378 US at 490, 12 L Ed2d at 985-986 (emphasis in original).

The requirements established in *Miranda* are also necessary to help make the interrogation process less of a contest of wills. As Mr. Justice Story remarked in this regard almost a century and a half ago:

> It has been contrived, (it is pretended) that innocence should manifest itself by a stout resistence, or guilt by a plain confession; as if a man's innocence were to be tried by the hardness of his constitution, and his guilt by the sensibility of his nerves.
> 3 Story, *Commentaries on the Constitution of the United States*, §1782 (1833).

As noted in the studies cited in Part IIIA, *supra*, the fears that *Miranda* would cripple or in any significant manner impair law enforcement have proven unfounded.[16] Indeed, the main criticism of the rule today is directed at its inflexibility rather than any alleged crippling effect. Professor Vorenberg has noted, however, that elimination of *Miranda* would not in any material way solve the problems of crime:

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[16] Similar criticisms were raised and then shown to be unwarranted after other decisions similarly protecting constitutional rights. *Cf. Elkins v United States*, 364 US 206, 218-221, 80 S Ct 1437, 4 L Ed2d 1669, 1678-1679 (1960), regarding the experiences of the Federal Bureau of Investigation subsequent to *Weeks v United States*, 232 US 383, 34 S Ct 341, 58 L Ed 652 (1914), and the experiences in California subsequent to *People v Cahan*, 44 Cal 2d 434, 282 P2d 905 (1955). Regarding the effects of *People v Dorado*, 62 Cal 2d 338, 42 Cal Rptr 169, 398 P2d 361 (1965), requiring warnings very similar to *Miranda*, see Younger, *supra*, 35 Fordham L Rev at 256-257.

> . . .there. . .is an impression that has been created, and I think people at a very high level have responsibility for that impression, that somehow if we could reverse *Miranda* and do away with a few other protective provisions, that the police would be able to stop crime. I think a policeman, left to think it through himself, knows that is not so. Testimony of Professor James Vorenberg, former Executive Director, President's Commission on Law Enforcement and Administration of Justice, Hearings on H. Res. 17 before the Select Committee on Crime of the House of Representatives, 91st Cong., 1st Sess. 267, 278 (1969).

Moreover, strict adherence to the rule is necessary for the protection of the rights subject to loss.[17] This is well illustrated by this Court's experience with *McNabb* prior to the announcement of a *per se* rule in *Mallory*. *Cf.* Hogan & Snee, "The *McNabb-Mallory* Rule: Its Rise, Rationale and Rescue", 47 Geo L J 1 (1958).

If *Miranda* had truly created serious problems of law enforcement in the states, this Court was not the only place where relief could have been obtained. The states were left free by the Court to consider alternative

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[17] *Cf.* Hoover, J. Edgar, *FBI Law Enforcement Bulletin*, September 1952, pp 1-2:

> ". . .When any person is intentionally deprived of his constitutional rights, those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism." Cited in *Elkins, supra*, at 364 US at 218, 4 L Ed2d at 1678.

American Bar Association Project on Standards for Criminal Justice, *The Urban Police Function* (Tentative Draft, 1972) Sec. 5.1:

> "Since a principal function of police is the safeguarding of democratic processes, if police fail to conform their conduct to the requirements of law, they subvert the democratic process. . ."

measures as long as they were fully as effective as the *Miranda* warnings. *Id.*, 385 US at 444, 467, 16 L Ed2d at 706, 719-720. That there has been no rush by the states to substitute for the rule set out in *Miranda* is testimony to its non-disruptive effects.

It is suggested by Petitioner that this Court return to the due process test existing prior to *Miranda*. Brief of Petitioner, p 15. Petitioner's *Amici* Americans for Effective Law Enforcement and International Association of Chiefs of Police, Inc., argue that the Court should either return to the prior standard or modify *Miranda* to condone technical or inadvertent errors or errors where reversal would produce a miscarriage of justice. Brief of *Amici*, AELE-IACP, p 26.

The error in this case, failure to advise an indigent of his right to court-appointed counsel, cannot reasonably be considered a mere technicality. Even if it were, however, sanctioning "technical" errors would effectively overrule *Miranda*, for decisions as to what is technical and what is gross or egregious would return the Court to a determination of the totality of the circumstances. The same considerations compel rejection of a "miscarriage of justice" exception. Similarly, inadvertence, like good faith, is irrelevant. *Beck v Ohio*, 379 US 89, 85 S Ct 223, 13 L Ed2d 142 (1964).

The ease of giving the full warnings balanced against the strong social importance of the privilege strongly argues against any modification, *Miranda*, *supra*, 384 US at 468, 16 L Ed2d at 720, for if the rule were modified, police would also be encouraged to give less than full attention to assuring that a suspect is fully informed.

Petitioner's proposed approach ultimately fails, however, because of its intrinsically arbitrary nature:

> . . . [it] involves a great deal of subjectivity on the part of judges, making it extremely difficult to draw any real lines of distinction. Unable to foresee what activity will result in the exclusion of evidence, law

enforcement officials may find it difficult to establish workable rules of procedure and convenient not to take the proscription seriously. Pitler, 56 Cal L Rev, *supra*, at 583.

Mr. Justice Jackson, in his plurality opinion for four Justices, and Mr. Justice Clark, in his concurring opinion, in *Irvine*, *supra*, touch the heart of the problem with such an approach:

> We are urged to make inroads upon Wolf by holding that it applies only to searches and seizures which produce on our minds a mild shock, while if the shock is more serious, the states must exclude the evidence or we will reverse. . . .We think. . .that a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional ground. . . .
> We decline to introduce vague and subjective distinctions. 347 US at 133-134, 98 L Ed at 569-570, opinion of Jackson, J.

> Of course, we could sterilize the rule announced in Wolf by adopting a case-by-case approach to due process in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and impredictability that it would be impossible to foretell–other than by guesswork–just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. 347 US at 138, 98 L Ed at 572, opinion of Clark, J.

See also W. Schaefer, *The Suspect and Society* 34 (1967).

Miranda was decided because prior efforts to obtain compliance with the Constitution by local courts, prosecutors and police were unsuccessful. It was made necessary by abuses that went almost completely un-

checked anywhere but in this Court, and by this Court's incapacity to give justice to all but a few of the persons who petitioned for relief. The "now familiar warnings" *Bustamonte, supra,* _____ US at ____ , 36 L Ed2d at 865 have provided "undiluted respect" for the Fifth Amendment privilege, an opportunity for safeguarding the trial process, and an administrable standard for judicial review in "a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load'." *Tehan v Shott,* 382 US 406, 416, 415, 86 S Ct 459, 15 L Ed2d 453, 460, 459 (1965). Moreover *Miranda* has not harmed law enforcement.

Miranda v Arizona should not be overruled or modified; it should be adhered to in its entirety.

CONCLUSION

For all the reasons stated above, the decision of the Court of Appeals should be affirmed or, in the alternative, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

KENNETH M. MOGILL, ESQ.
506 Monroe Avenue
Detroit, Michigan 48226
Telephone: (313) 962-7210

Attorney for Respondent